UNITED STATES OF AMERICA	)	
	)	**Supplement to**
v.	)	
	)	**Prosecution Motion for Protective Order**
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	**8 March 2012**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The United States in the above case requests that the Court adopt the enclosed Protective Order, Supplement to the Protective Order Governing Classified Information, and select procedures for closing the courtroom.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. See Manual for Courts-Martial, United States, R.C.M. 905(c)(1) (2008). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. See R.C.M. 905(c)(2). Although the defense is the original moving party, the United States is the appropriate moving party for a protective order for classified information. See Manual for Courts-Martial, United States, Mil. R. Evid. 505(g)(1).

FACTS

The United States incorporates those facts contained in Prosecution Motion for a Protective Order.

Based on the volume of classified information, which spans more than ten different Original Classification Authorities (OCAs), and the complexities involved with determining whether certain information is or is not classified, the United States has endeavored to develop a process that will facilitate and expedite the filing process with minimizing the concern that a spillage may occur by any party or the Court. See Enclosure 1 (providing just a small sampling of classified information that might otherwise seem unclassified, but has been determined to be classified by the appropriate OCAs).

On 1 March 2012, the United States requested that "the defense security consultants be granted access to Secret Internet Protocol Router Network (SIPRNET) for the limited purpose of communicating, on behalf of the defense team, with the military judge, court information security officer, and the prosecution." Enclosure 2.

On 2 March 2012, the Deputy Chief of Staff for Intelligence approved the above request. See id.

WITNESSES/EVIDENCE

The United States does not request any witnesses be produced for this response. The United States respectfully requests that the Court consider the following enclosures to this response:

1. Evidence Classification Examples, 8 March 2012
2. Request and Approval for Limited Defense Access to SIPRNET, 1-2 March 2012
3. Protective Order (w/ Encl)
4. Supplement to the Protective Order Governing Classified Information, 8 March 2012
5. Script for Initial Closure Hearing
6. Close Courtroom Battle Drill
7. Bailiff Script for Closed Sessions

LEGAL AUTHORITY AND ARGUMENT

The United States relies upon the legal authority and argument advanced in Prosecution Motion for a Protective Order.

I: THE UNITED STATES REQUESTS THAT THE COURT ADOPT A SUPPLEMENT TO THE PROTECTIVE ORDER FOR THE EFFICIENT, YET CAUTIOUS, HANDLING AND STORING OF INFORMATION.

In addition to the enclosed Protective Order, the United States proposes that the Court implement a Supplement to the Protective Order Governing Classified Information (hereinafter "Supplement") for certain facts and categories of information, which will ensure that all parties and the Court are handling and storing classified information in a manner consistent with their markings, classification reviews, and the protective order, without requiring an OCA's direct involvement each time a substantive filing, communication, and other administrative decision is made. See Enclosure 3-4.

This Supplement would require the parties, their security experts, and ultimately the court security officer, to mark any substantive filing containing information listed on the Supplement with the given classification level. For example: Assume the Supplement requires that "Fact A" and any associated relationship with "Fact A" be treated as "SECRET//ORCON/NOFORN." If during the filing process, as outlined in the protective order, the defense security experts or the court security officer discover "Fact A" or a reference to "Fact A," then the expert and/or court security officer will mark the entire document "Treat as SECRET//ORCON/NOFORN" and this document will be stored and handled as if it was classified "SECRET//ORCON/NOFORN" without requiring any unneeded delay by having the court security officer contact an OCA for a classification decision.

If a topic arises that is not covered by the Supplement, then the defense security experts will notify the court security officer of the potential for additional classified information that is not covered by the current Supplement. In an abundance of caution, the information will be tentatively treated as classified at the appropriate level, in order to not hinder any filing process.

The court security officer will then coordinate through the trial counsel with the appropriate OCA or their delegate for a determination whether this information should be treated as classified. The prosecution will simply act as the conduit for efficient communications between the court security officer and the OCA or their delegate, and will not make any classification determinations based on the presented information.

Under the proposed Supplement, if the defense intends to use information that is marked classified or treated as classified pursuant to this Supplement, then they will be required to give notice under MRE 505(h), upon which the prosecution will initiate the procedures under MRE 505(h). If the prosecution intends to use information that is marked classified or treated as classified pursuant to this Supplement, then the prosecution will coordinate with the OCA in a manner consistent with its ongoing processes. Assuming OCAs provide use approval, then the prosecution will obtain classification reviews which should suffice to provide the Court with a factual background to make the appropriate findings to close the Court under RCM 806(b)(2) and Grunden. See United States v. Grunden, 2 M.J. 116, 121 (C.M.A. 1977).

Additionally, under the proposed Supplement, the Court will self-impose limitations on what information should be considered classified for its own documents and orders. The court security officer will be able to use the Supplement as the standard to ensure the Court does not have accidental disclosures of classified information.

The Supplement will eliminate the need to have the prosecution or court security officer directly coordinate with different OCAs for each filing or during an Article 39(a) session (if unintended discussions occur) because all parties will be on notice as to what information should be treated as classified. Additionally, this process will allow the parties to file their motions and other substantive documents, pursuant to the protective order, without requiring the court security officer or any other individual to coordinate with an OCA for each filing and each time an issue arises for classification. The court security officer will be able to review documents following the Supplement and make determinations, not based on what information is actually classified, which requires OCA determinations, but rather err on the side of caution and not slow the judicial process.

Based on input from relevant OCAs and upon motion by the government, this Supplement can be updated as new information is introduced during the judicial process.

II: THE UNITED STATES REQUESTS THAT THE COURT PROSPECTIVELY ADOPT PROCEDURES FOR CLOSING THE COURTROOM UNDER GRUNDEN.

The United States anticipates that certain portions of evidentiary motions hearings and the trial, particularly those focused on classified evidence, will cause both parties to move the Court to conduct a closed session for purposes of taking classified evidence. The United States anticipates two types of closed session - planned and unplanned closures.

A. The United States offers the underlying procedures for planned closures of the courtroom.

The United States respectfully requests that the Court adopt the procedures that follow for planned closures of the courtroom. Immediately prior to litigating classified evidentiary motions at the designated Article 39(a) session, or during the Grunden hearing scheduled on the court calendar, the United States and defense must file motions to request the Court to conduct a Grunden hearing under RCM 806(b)(2) and provide the adequate basis for a court closure. The purpose of this request is to motion the Court to review classified information or evidence that each party anticipates to use during all future sessions. The purpose of this "Initial Closure Hearing" will be for the Court to determine whether the information at bar warrants closure under MRE 505(j)(5), RCM 806(b)(2), and Grunden, and if so then make the requisite findings on the record for all classified information to be considered. The "Initial Closure Hearing" serves as an efficient method for the Court to place all required findings under RCM 806(b)(2) on the record prior to the information being presented. After the "Initial Closure Hearing," the normal motions practice or trial will begin. Once a party reaches the point in a session that they intended to elicit classified testimony or reference classified information or evidence, then the party will motion the Court to close the session based on the "Initial Closure Hearing" ruling. The United States offers the enclosed scripts and processes for the "Initial Closure Hearing", Opening the Courtroom, and Closing the Courtroom. See Enclosures 5-7.

B. The United States offers the underlying procedures for unplanned closures of the courtroom.

The United States respectfully requests that the Court adopt the below procedures for unplanned closures of the courtroom. To best explain unplanned closures, the United States offers the below excerpt from the United States Navy military justice primer for courts-martial involving classified information. See United States Navy, *Primer for Litigating Classified Information Cases - Prosecuting, Defending, and Adjudicating Cases Involving Classified Information*, National Security and Intelligence Law Division (Code 17) (now Code 30), at 10-9 and 10-10, 2008.

> An "unplanned closure" will occur when counsel, the court security officer, equity owner subject matter expert, witness, or other individual informs the military judge of the need for a closed session if testimony "strays toward disclosure of classified information when testimony is given in open session." *Denver Post Corp. v. U.S.*, Army Misc. 20041215 (23 February 2005)(Unpub. op. at 4). This may result from the person recognizing that a question contains classified information or calls for a classified answer. Often the security officer will have a pre-arranged signal or device that can be used to indicate to the judge that this danger is present. Witnesses should be advised that if they believe that an answer to a question, or the question itself, may involve classified information, to notify the military judge immediately in a discreet manner.

> The military judge should then immediately halt the testimony, questioning or argument. No reason should be given on the record at that time as to the reason for halting the proceedings. The military judge should proceed to hold a conference under RCM 802 with the security officer and the parties in order to determine whether there is, in fact, suspected classified information at issue. As counsel often do not have experience with the classified information at issue, it may well be that they did not intend for the question to evoke a classified answer. In such a case, a simple reminder instruction to the witness to keep his answer unclassified will usually be sufficient.
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> If there is, indeed, a desire on the part of one of the parties to discuss classified information that has not previously been the subject of a [Initial Closure Hearing], the military judge should proceed with a 39(a) session outside the presence of the members in order to make the determinations required by RCM 806(b)(2). If the 39(a) session itself is closed, the military judge should be sure to include an unclassified summary of his findings on the unclassified record. Even in the middle of trial, it is necessary to consider reasonable alternatives to the use of the classified information. Generally, it is normally possible for the witness to raise the factual level of his testimony so that the information is more generic and the source is obscured, i.e., provide unclassified testimony.
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> Finally, all parties at the trial should be aware of the possibility that when members pose questions during a trial that involves classified matters, a question could prompt an answer that is classified. The better practice is to have all written members questions reviewed by the court security officer before they are provided to the judge so that the court security officer can alert the judge of whether the question poses a risk in open court. This allows the judge to remind the witness to answer in an unclassified manner, and to instruct the witness to simply alert the judge if the witness needs to answer with classified information. The court security officer may be able to assist the judge in slight rewording of questions to avoid these issues all together.

Given the inherent difficulties associated with unplanned courtroom closures, the United States respectfully requests that the Court prospectively adopt the above procedures for unplanned closures of the courtroom.

CONCLUSION

The United States requests the Court enter an appropriate protective order to guard against the compromise of classified information by the accused, defense counsel, and any individual detailed to the defense team.

ASHDEN FEIN
CPT, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel and Major Matthew Kemkes, Senior Military Defense Counsel, via electronic mail, on 8 March 2012.

ASHDEN FEIN
CPT, JA
Trial Counsel